

## **REMARKS**

Upon entry of the foregoing amendments, claims 1-5 and 8-10 are under consideration. Claims 1 and 10 have been amended. Claims 6-7 and 11-49 have been canceled. Support for the amendment to claim 1 can be found in the as filed specification at page 15, line 12. No new matter has been added.

### **Oath/Declaration**

The Examiner has indicated that the Oath or Declaration filed on December 23, 2003 indicates that the Applicant is claiming foreign priority; however, there are no foreign documents listed in the oath or provided with the application. Applicant inadvertently checked the foreign priority box on the Oath or Declaration, no foreign priority claim is being made in the instant application.

### **Rejections under 35 U.S.C. § 112, second paragraph**

The Examiner has indicated that claims 5-7 and 10 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention. Claim 5-7 have been canceled, thus this rejection is moot with respect to these claims. Claim 10 has been amended to depend from claim 9. Applicants assert that as amended claim 10 is definite. This rejection should be withdrawn.

### **Rejections under 35 U.S.C. § 102**

The claims have been rejected under 35 U.S.C. 102 (b) as being anticipated by Zakhartchenko et al (“Zakhartchenko”), Wilson et al. (“Wilson”), Terouanne et al. (“Terouanne”) and Levine et al (“Levine”).

Applicants have amended independent claim 1, to clarify the patentable distinctions between the instant invention and Zakhartchenko, Wilson, Terouanne and Levine. Specifically, Applicant's have amended claim 1 to require that the polynucleotide contains a cis-acting Ang-2 regulatory element. Neither Zakhartchenko, Wilson, Terouanne nor Levine describe a polynucleotide including nucleic acid encoding a light-generating gene product, a nucleic acid encoding a selectable marker *and* a cis-acting Ang-2 regulatory element as required by the claims as amended.

Accordingly, neither Zakhartchenko, Wilson, Terouanne nor Levine teach or suggest every element of the claimed invention and therefore cannot anticipate independent claim 1 (and

the claims that depend therefrom). Therefore, Applicants assert that the rejection should be withdrawn.

**Rejections under 35 U.S.C. § 103(a)**

Claim 7 has been rejected as being unpatentable over Zakhartchenko, in view of Yee et al. ("Yee). Zakhartchenko, in view of Hwang et al. ("Hwang") or Hu ("Hu") and Levine in view of Hwang or Hu.

Claim 7 has been canceled thus these rejections should be withdrawn.

**CONCLUSION**

Applicants believe that the claims, as amended, are in condition for allowance. If the Examiner has any questions, the Examiner is invited to contact the undersigned by telephone.

Respectfully submitted,



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